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No. 197

DEC 10

IN THE

Supreme Court of the United States

October Term, 1935

UNITED STATES OF AMERICA,
Petitioner

v.

LOUIS H. PINK, Superintendent of Insurance of the State of New York, as Liquidator of the domesticated United States Branch of FIRST RUSSIAN INSURANCE COMPANY, Established in 1827,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR SUPERINTENDENT OF INSURANCE OF THE STATE OF NEW YORK, AS LIQUIDATOR OF FIRST RUSSIAN INSURANCE COMPANY, ESTABLISHED IN 1827, RESPONDENT

The Opinions Below

No opinion was rendered by the District Court in this case, it having been decided on the authority of the deci-

sions in *United States of America* v. *Bank of New York and Trust Company* and *United States of America* v. *President and Directors of The Manhattan Company*, which cases are to be reviewed simultaneously with this case, and are numbered 195 and 196, respectively. They are reported in 10 Fed. Supp. 269. The opinion of the Circuit Court of Appeals is reported in 77 Fed. (2d) 880.[1]

Statement

By an order of the Supreme Court of the State of New York, New York County, dated August 8, 1925, as resettled by an order dated September 11, 1925,[2] and pursuant to Section 63 of the Insurance Law of the State of New York,[3] the Superintendent of Insurance took possession of the assets of the United States Branch of said company and, pursuant to orders and directions of the said Supreme Court, the said Superintendent of Insurance, as liquidator, investigated, ascertained, fixed and determined the claims of policyholders and creditors in the United States of the said company and paid such of said claims as were found to be valid. A substantial surplus of assets belonging to said company then remained in possession of the liquidator, concerning the disposition of which long litigation ensued in the courts of the State of New York. Finally, the Court of Appeals of the State of New York, by its decision, reported in 255 N. Y. 415, directed that such surplus funds, after payment of policyholders and creditors of the United States Branch of said company, should be

[1] The Circuit Court of Appeals affirmed the order of the District Court on the authority of *United States* v. *Bank of New York and Trust Company*, which opinion is reported in 77 Fed. (2d) 866.

[2] Record, pages 32-37.

[3] Set out in Appendix at pages 59-62.

applied by the liquidator to the liquidation of all valid claims filed with him against the First Russian Insurance Company arising from business transacted by the said company *outside of the United States.*[4] An order of the New York Supreme Court upon the remittitur of the New York Court of Appeals, making the order and judgment of the Court of Appeals the order and judgment of the New York Supreme Court, was entered on June 16, 1931 (R. 37-42).

Up to this point the facts in this case are identically the same as those in the *Bank of New York and Trust Company* and *President and Directors of the Manhattan Company* cases. All three companies were being liquidated by the Superintendent of Insurance, pursuant to orders entered upon the decisions of the Court of Appeals in 255 N. Y. 415, *et seq.* In the Moscow Fire Insurance Company and the Northern Insurance Company of Moscow liquidations, comparatively few foreign claims had been filed with the liquidator, and, after payment thereof, the liquidator, pursuant to the decisions of the Court of Appeals, turned over the surplus assets in the case of the Moscow Company to the Bank of New York and Trust Company, as agent or depositary of the Moscow Company and of Paul Lucke, as surviving director and conservator, and in the case of the Northern Insurance Company, the liquidator turned over the remaining surplus assets, after payment of the filed foreign claims, to the President and Directors of the Manhattan Company, as agent or depositary. Thereafter, in those two companies, proceedings were taken in the New York Supreme Court to determine the disposition of such funds. In the *Bank of New York and Trust Company* case (Moscow Company) such suit

[4] Italics are ours throughout the brief unless otherwise noted.

had proceeded to judgment prior to the commencement of the suit against it by the petitioner (R. *Bank of New York and Trust Co.* 45, 49).

At this point, however, the facts regarding the First Russian Insurance Company differ materially from those in the *Bank of New York* (Moscow Fire) and the *Manhattan Company* (Northern Insurance Company of Moscow) cases. In the instant case the liquidator, pursuant to the decision of the New York Court of Appeals (255 N. Y. 415), proceeded forthwith to detemine the large number of claims of foreign creditors of said company filed with him. *Certain of said foreign claims were approved and allowed by the liquidator and payments on account thereof as allowed were made in December, 1933, after recognition of the present Russian government by the United States of America, and pursuant to orders of the New York Supreme Court* (R. 65). Other foreign claims against the said company were disallowed by the liquidator *and are now being heard before a referee appointed by the New York Supreme Court* (R. 65), who has been hearing many objections to the liquidator's recommendations and disallowances, but who has not yet filed his reports. Two claims of American citizens have been reduced to judgments (R. 4-5) affirmed by the New York Court of Appeals after recognition (*Matter of People—First Russian Ins. Co., Claims of Campbell, et al., and Imchanitzky*, 266 N. Y. 421). Payment of such judgments is prevented by the injunction herein (R. 31-32). The instant suit by the United States Government was commenced on November 14, 1934, long after the orders above referred to were made by the New York Supreme Court. *The liquidator is still conducting the liquidation proceeding pursuant to orders of the New York Supreme Court* (R. 32-50).

Questions Presented

1. Whether title based upon Soviet decrees of confiscation, to private property which has always been located in the State of New York and which has never been in the possession or control of any Russian government will be recognized or enforced by our federal courts, particularly when the highest court of the state has denied extraterritorial effect to such decrees as contrary to its public policy.

2. Whether by the exchange of letters dated November 16, 1933, between the President and the People's Commissar for Foreign Affairs of the Soviet government (R. 27-29), title to the property involved here was intended to be assigned, and, if so, whether it was validly assigned to and accepted by the petitioner.

3. Whether the federal courts have jurisdiction of this action, the New York State courts having assumed jurisdiction and actual possession of the funds in controversy long prior to the inception of the instant suit, and the Superintendent of Insurance even now carrying on the liquidation pursuant to directions of the courts of New York State.

Summary of Respondent Liquidator's Argument

The bill of complaint admits that the petitioner's claim is based upon Soviet confiscatory decrees (R. 4). Such confiscatory decrees might operate within the jurisdiction

of the Soviet government, but, because such decrees are contrary to our public policy, our courts will not recognize or give extraterritorial validity or effect to them so as to vest title to the fund either in the Soviet government or its assignee. The funds in suit have always been within the State of New York, and the highest court of said state has declared that the admittedly confiscatory decrees of the Soviet government are against its public policy and unenforceable here.

The nature of the confiscatory decrees and the effect given them in this forum was not changed through recognition of the Soviet government. The retroactiveness of laws or decrees of recognized nations, if they are confiscatory, does not refer to acts sought to be given extraterritorial effect.

The acceptance by the petitioner of the alleged assignment is not conclusive or determinative of the question of public policy. The executive may only determine the political policy of our government and our courts are not precluded from judicially determining the effect of these decrees where private property is concerned.

The assignment did not cover the fund in suit and no title to it was assigned to or accepted by the petitioner. The assignor, not having acquired title, its assignee, the petitioner in the case at bar, acquired none. Moreover, the language of the assignment itself indicates that it was never intended to assign this fund.

The federal court has no jurisdiction of the suit, because the state court, long prior to the inception of the instant suit, acquired jurisdiction and possession of the *res*. The Superintendent of Insurance, as liquidator, pursuant to Section 63 of the Insurance Law, and pursuant to orders of the New York State courts, has, since 1925,

retained jurisdiction and possession of the property in accordance with the decisions of the Court of Appeals of the State of New York. The state court having once acquired jurisdiction and possession of the *res* may deal with it as it pleases in order that justice and equity may prevail.

ARGUMENT

POINT I

The petitioner admits that its claim is founded upon an assignment of title acquired by confiscation. Our courts will not recognize or enforce such a title based upon Soviet decrees of confiscation over the property in question here. Such decrees are in violation of our established national and state public policy.

The bill of complaint affirmatively states that the petitioner's claim is based upon Soviet confiscatory decrees (R. 4). The decrees themselves show their confiscatory nature (R. 19-25). Though it is affirmatively claimed that the title of the Soviet government alleged to have been assigned to the complainant is based upon such confiscatory decrees, it is nevertheless asserted by the petitioner that such decrees establish the right of the Soviet government to the fund in suit and, consequently, make out valid title in the petitioner, to property which has always been within the State of New York, and has been and is being administered by the courts of New York since 1925.

These confiscatory decrees might operate within the territorial jurisdiction of the Soviet government, where that government had the power and control to exercise its jurisdiction and authority, but, because their confiscatory character and nature are so contrary and repugnant to our public policy, our courts will not recognize or give such extraterritorial validity to said decrees so as to vest title to the fund in suit either in the Soviet government or its assignee. **These assets are and were at all times private property, were never within the possession or control of any Russian government, have always been in this country, and could not be extraterritorially affected by those decrees.**

The petitioner, as the alleged assignee of the Soviet government, upon a claim asserted to exist in the Soviet government based upon confiscatory decrees, sues here in a non-governmental capacity and has no greater rights than the Soviet government itself would have if such assignment had not been executed. The alleged transfer of any alleged claim of the Soviet government against these funds to the United States cannot give to the claim any greater validity than it possessed in the hands of the assignor (*U. S.* v. *Buford*, 3 Peters 12, 30). The Soviet government did not acquire such a title as would be enforced by our courts if the Soviet government itself were the plaintiff in the instant suit instead of the present petitioner.

The legislation of any country has no extraterritorial effect or force as a matter of right. *Second Russian Insurance Co.* v. *Miller*, 297 Fed. 404, 408-409, C. C. A. 2d Circ. (citing *Rose* v. *Himely*, 4 Cranch 41, MARSHALL, *C.J.*), affirmed 268 U. S. 552.

The Apollon, 9 Wheat. 362, STORY, *J.*;
Hilton v. *Guyot*, 159 U. S. 113.

The extent to which the law of one nation is recognized, and allowed to operate within the domain of another nation, depends upon so-called comity (*Second Russian Ins. Co.* v. *Miller, supra,* p. 409, citing *Bank of Augusta* v. *Earle,* 13 Peters 519, 589). But, when comity conflicts or is not in accord with the public policy of the nation or state where such foreign law is sought to be given effect, it must give way and yield to public policy. In *Bank of Augusta* v. *Earle, supra,* this Court said:

> "It (comity) is the voluntary act of the nation by which it is offered and is inadmissible when contrary to its policy or prejudicial to its interests."

In a recent decision of the New York Court of Appeals (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust,* 263 N. Y. 369, 378, Feb. 27, 1934), it is said:

> "The principle which determines whether we shall give effect to foreign legislation is that of public policy (citing cases). *Where there is confliction between our public policy and comity, our own sense of justice and equity as embodied in our public policy must prevail* (citing authority). We give or deny the effect of law to decrees or acts of a foreign governmental establishment in accordance with our own public policy" (*Russian Reinsurance Co.* v. *Stoddard,* 240 N. Y. 149, 163).

The question naturally arises, what is public policy, and further, what is our public policy in relation to the foreign law sought to be enforced here? The term, "public policy," in itself, is vague and susceptible of many different interpretations, but it is universally agreed that confiscation of private property is so shocking and offensive to our conception of morals and justice that it comes

within the rule of private international law concerning the exception of public order or policy. That exception is, that a state having jurisdiction will not enforce foreign legislation contrary to the fundamental concepts of law of the state having such jurisdiction. The exception of this rule of private international law is in harmony with our statement that the confiscatory decrees in question can only operate within the territorial jurisdiction of the Soviet government. The exception to the rule is applicable when the enforcement of the foreign legislation would be against the moral and social conceptions of the state having jurisdiction.

Many countries have incorporated this exception of public order or policy in their own civil codes.

Civil Code of Italy,
Argentine Republic,
Code Napoleon (*France*),
Greece,
Congress of Montevideo (Art. 4 of Protocol),
Acts of the Second Hague Conference for the Unification of Private International Law (Art. 11).

The exception of public policy is operative in American law when the enforcement of the foreign law or decree contravenes an important public policy of the state of the forum, and where it contravenes the canon or morality established by civilized society (*Manor, Conflict of Laws,* pp. 9, *et seq.*). It is contrary to the public policy of this forum to aid in carrying out a wholesale dissolution and confiscation of assets of corporations *outside* of Russia, and our courts have extended the exception of public order so as to refuse effect to such decrees both in respect to dissolution and confiscation.

A. Our public policy is opposed to the Soviet decrees of confiscation.

During the time when proceedings were being had in the courts of the State of New York in the liquidation of this and other Russian insurance companies,[5] the Court of Appeals of that State authoritatively declared time and again, both before and after recognition of Soviet Russia, that the Soviet decrees admitted by the petitioner to be confiscatory, were contrary to the public policy of the State of New York, shocking to its sense of justice and equity, and not enforceable in that state. The New York Court of Appeals has further held that the Soviet government acquired no title to any assets in the State of New York of former Russian corporations, such title being based on identical Soviet decrees through which the appellant herein relies for its title (*Vladikavkazsky Ry. Co.* v. *N. Y. Trust,* 263 N. Y. 369, 378-379; *James* v. *Second Russian Ins. Co.,* 239 N. Y. 248, 257).

The funds in suit have always been within the State of New York, and the highest court of said state has declared that the admittedly confiscatory decrees of the Soviet government are against its public policy and unenforceable here. In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co., supra,* decided after recognition of the Soviet government by the United States, the New York Court of Appeals, in no uncertain terms, clearly set forth the public policy of the State of New York. That court said, at pages 378-379:

> *"It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its*

[5] The First Russian Insurance Company is still being liquidated by the Superintendent of Insurance of the State of New York under supervision of the court (R. 29-50).

assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts (*Baglin* v. *Cusenier,* 221 U. S. 580).

"We enforce the same principle even in regard to statutes of sister States (*Barth* v. *Backus,* 140 N. Y. 230, 239)."

The federal court, therefore, is without power or authority to enforce such Soviet decrees over property and funds within the State of New York, where the declared public policy of the State of New York has been to deny the effect of Soviet decrees of confiscation over property located in that state (*Clark* v. *Williard,* 294 U. S. 211, 213; *City Bank Co.* v. *Schnader,* 293 U. S. 112, 118-119; *Burnet* v. *Brooks,* 288 U. S. 378, 379; *Pennoyer* v. *Neff,* 95 U. S. 714, 722).

In *Cooper* v. *Newell* (1899), 173 U. S. 555, the court said (p. 566):

"A domestic judgment is the judgment of a domestic court, and a domestic court is a court of a particular country or sovereignty. Undoubtedly the judgments of courts of the United States are domestic judgments of the Nation, while in the particular State in which rendered they are entitled to be regarded as on the same plane in many senses as judgments of the State; and so the judgments of the courts of the several States are not to be treated by each other or by the courts of the United States as in every sense foreign judgments. But the courts of the United States are tribunals of a different sovereignty, and exercise a distinct and independ-

> ent jurisdiction from that exercised by the state courts, and this is true in respect of the courts of the several States as between each other. *And the courts of the United States are bound to give to the judgments of the state courts the same faith and credit that the courts of one State are bound to give to the judgments of the courts of her sister States.*"

The public policy of the United States is no different from that of the State of New York, and the federal courts likewise will not enforce such decrees over property which has always been located within the jurisdiction of our courts.

In *Russian Volunteer Fleet* v. *United States* (282 U. S. 481, 491-492), the Court, by HUGHES, *Ch.J.*, said:

> "As alien friends are embraced within the terms of the Fifth Amendment, it cannot be said that their property is subject to confiscation here because the property of our citizens may be confiscated in the alien's country. *The provision that private property shall not be taken for public use establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments.*"

See also:

> *Loucks* v. *Standard Oil,* 244 N. Y. 99;
> *State of Colorado* v. *Harbeck,* 232 N. Y. 71;
> *Marshall* v. *Sherman,* 148 N. Y. 9;
> *Barth* v. *Backus,* 140 N. Y. 230.

The principle here invoked was well settled in the Federal courts long prior to the time when any question first arose with reference to the force and validity in this country of the Soviet decrees of confiscation.

In *Baglin* v. *Cusenier Co.* (221 U. S. 580), this Court considered the effect in this country of the French law of July 1, 1901, known as the Association Act, which dissolved the Congregation of the Chartreux and confiscated its property. The question arose, among others, whether such French law had any effect upon the trade-marks previously registered in the United States by such Congregation and used in connection with the business of the monks of the Congregation transacted in this country. Mr. Justice HUGHES, in deciding this question in the negative, said, at page 596:

> "The French law cannot be conceived to have any extra-territorial effect to detach the trade marks in this country from the products of the monks, which they are still manufacturing."

The same question had previously arisen in the British House of Lords (*Lecouturier* v. *Rey* [1910], A. C. 262), and Mr. Justice HUGHES quoted with approval from the opinion of Lord MACNAGHTEN in that case as follows:

> "To me it seems perfectly plain that it must be beyond the power of any foreign Court or any foreign legislation to prevent the monks from availing themselves in England of the benefit of the reputation which the liquers of their manufacture have acquired here or to extend or communicate the benefit of that reputation to any rival or competitor in the English market."

As tersely expressed by Chief Justice MARSHALL in *The Antelope* (10 Wheat. 667, 123), "The courts of no country execute the penal laws of another." The word "penal" as used in the maxim of Chief Justice MARSHALL includes

any extraordinary pecuniary liability imposed by law by way of punishment (*Huntington* v. *Attrill*, 146 U. S. 657, 667), and applies to all suits in favor of the state for the recovery of pecuniary penalties (*Wisconsin* v. *Pelican Ins. Co.*, 127 U. S. 265, 290). *A fortiori*, the principle applies to out and out decrees of confiscation. Indeed, quite apart from the point that the Soviet decrees are penal or confiscatory, it is well established that an assignment by operation of law as distinguished from a voluntary assignment "has no legal operation out of the state in which the law was passed" (*Cole* v. *Cunningham*, 133 U. S. 107, 129; *Security Trust Co.* v. *Dodd, Mead & Co.*, 173 U. S. 624, 629).

And so it has been held in this District that the courts of one state or country will not execute or enforce the revenue or penal laws of another state or country (*Moore* v. *Mitchell*, 30 D. [2d] 600, affirming judgment below, 28 F. [2d] 997).

The argument on this point may be emphasized with the following quotation from the opinion of Mr. Justice GRAY in the case of *Hilton* v. *Guyot* (159 U. S. 113, 163-164):

> "No law has any effect of its own force beyond the limits of the sovereignty from which its authority is derived. The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.' Although the phrase has often been criticized, no satisfactory substitute has been suggested.

> "'Comity' in the legal sense is neither a matter of absolute obligation on the one hand, nor of mere courtesy and good will upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or other persons who are under the protection of its laws."

Confiscation of private property is contrary to our public policy and to our public institutions, and it follows that this Court must declare that the Soviet decrees of confiscation upon which the complainant United States relies have no force or validity with reference to private property which has always been located in this country.

From the foregoing it will be seen that the Soviet government has no title to this property which our courts will enforce. Our federal courts have consistently followed that rule.

Kennett v. *Chambers,* 14 How. 39, 146 Ed. 316;
U. S. v. *Trumbull* (D. C.), 48 Fed. 99;
Agency of Canadian Car Co. v. *American Can Co.* (C. C. A.), 258 Fed. 363, A. L. R. 1182;
Baglin v. *Cusenier, supra;*
Lehigh Valley Ry. Co. v. *State of Russia,* 21 Fed. (2d) 396.

B. Recognition gave no retroactive validity to these confiscatory decrees in our courts.

The nature of the confiscatory decrees and the effect they will be given in this forum was not changed through recognition of the Soviet government. Recognition of the

Soviet government by the United States gave no retroactive validity to the Soviet decrees of confiscation in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter.

Lehigh Valley Ry. Co. v. *State of Russia,* 21 Fed. (2d) 396;
Second Russian Ins. Co. v. *Miller, supra;*
Baglin v. *Cusenier, supra;*
Vladikavkazsky Ry. Co. v. *New York Trust Co., supra;*
James v. *Second Russian Ins. Co., supra;*
Frenkel v. *L'Urbaine Ins. Co.,* 251 N. Y. 243.

In *Lehigh Valley Ry. Co.* v. *State of Russia, supra,* the court said, at page 401:

> "* * * It is only the acts performed in its own territory that can be validated by the retroactive effect of recognition. Acts theretofore performed outside of its own territory cannot be validated by its recognition."

In *Vladikavkazsky Ry. Co.* v. *N. Y. Trust Co., supra,* the court said, at pages 378 and 379:

> "* * * *That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by us, affords no controlling reason why it should be enforced in our courts.* (*Baglin* v. *Cusenier,* 221 U. S. 580.)
>
> "We enforce the same principle even in regard to statutes of sister States. (*Barth* v. *Backus,* 140 N. Y. 230, 239.)

"The fact that the present Russian government was not recognized was not the basis of our refusal to give effect to its decrees nationalizing corporations and confiscating their property. During the period when those decisions were made, we recognized and enforced 'mere ordinary legislation' relating to 'every day transactions of business or domestic life.' (*Petrogradsky M. K. Bank* v. *National City Bank; supra; Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 428, 432.)

"*Prior to recognition we clearly intimated that our decision would have been the same if at the time recognition had been granted.* (*James & Co.* v. *Second Russian Insurance Co.*, 239 N. Y. 248, 257.)

"*The general statement contained in the opinion in Salimoff & Co.* v. *Standard Oil Co.* (262 N. Y. 220) *to the effect that recognition of a de facto government as a de jure government is retroactive in effect and validates all the acts of the government so recognized from the commencement of its existence, must be read in connection with its context and as so read it did not refer to acts sought to be given effect extraterritorially.*"

The same rule has been followed by our courts since the earliest days of our government. The same rule is also followed in all civilized countries.

The English courts have clearly stated and followed this rule in litigations based on decrees or legislation of the Soviet government. In *The Jupiter*, 96 L. J. P. 62 (1927), a ship formerly belonging to a nationalized Russian corporation was libelled. The ship having been sold by the Soviet government, the libellant maintained that no title was conveyed by the Soviet government, since the ship in question was outside of Soviet territory and not within Soviet jurisdiction when the corporate owner was national-

ized. Both the lower court and the Court of Appeals denied extraterritorial effect to the Soviet decree of nationalization, and in the latter court Lord Justice BANKS said (p. 250):

> "The decree had no operation to transfer any property except property within the jurisdiction of the Soviet Republic."

In *Employers Liability* v. *Sedgwick Collins* (1926), 1 K. B. L., affirmed on appeal to the House of Lords, 1927, A. C. § 95, speaking of these Soviet confiscatory decrees, the court said:

> "Effective as such legislation may be within the limits of Russian territory, *it cannot determine the ownership of property locally situate in this country.*"

It was held to the same effect in *Russian Bank for Foreign Trade* (1933), Ch. 745, also in *Russian Commercial Bank* v. *Comptoir D'Escompte de Mulhouse* (1925), A. C. 112.

The same rule has been followed by the courts of France. See—

Etat Russe v. *Compagnie Ropit* (1925), 52 Clunet, Journal de Droit International 391 (Trib. Comm. Marseille); (1926) 53 Clunet 667, 668 (Cour d'Aix); (1928) 55 Clunet 674 (Cour de Cassation);

Rosa Catana v. *Potocki,* Tribunal de Seine (1875), 2 Clunet 20;

Le duc de Cambridge v. *Le duc de Brunswick,* Cour Royale (1836), Sirey II, 70, 178;

also in

Cockerill v. *La Union et Phenix Espagnol,* Cour d'appel de Paris (Ire. Ch.), 23 Decembre, 1930, where the court said:

"The French courts will not give effect in France to the legislative acts of a foreign corporation *even though recognized* when they are contrary to French public policy *and will not give any effect to those decrees which in opposition to the principle contained in Article 545 of the Civil Code, pronounces the pure and simple confiscation of private property.*

"From which it follows that the Soviet decrees cannot invest the Russian State with the rights which the Russian Transport Company possessed in France."

See also—

Cie Nord de Moscou v. *Phenix Espagnol,* Cour d'appel de Paris (McNair, 1927-1928, No. 42, p. 66).

The courts of other countries have decided to the same effect.

In Germany, see——

Ginsberg v. *Deutsche Bank,* Kammergericht, Berlin (1925), 63 Decisions of Reichsgericht, p. 18; 93 Decisions of Reichsgericht, p. 183.

In Switzerland, see—

Wilbuschewitch v. *Zurich, Tribunal Federal* (1926) 53 Clunet 1110, 1113.

In Denmark, see——

Council of Russian Orthodox Community in Copenhagen v. *Legation of R. S. F. S. R.*, Supreme Court of Denmark (1925-1926), Annual Digest of International Law Cases 24.

See also the following texts:

Habicht, "The application of Soviet Laws and the exception of public order," 21 American Journal of International Law 238;

Borchard, "Unrecognized governments in American Courts," 26 American Journal of International Law 261;

Nebolsine, "Nationalized Russian Corporations, 39 Yale Law Journal 1130; "Confiscatory Decrees of Foreign Governments," 73 Solicitor's Journal (1928), Parts 1 and 2;

"Interpretation of the Confiscatory Phases of the Mexican Constitution of 1917" (R. B. Gaithor), 56 American Law Review, pp. 39-55;

"Confiscation of Private Property of Foreigners under Color of a Changed Constitution," by Ira Jewell William, 5 American Bar Association Journal 152 to 162.

Thus, it has been conclusively established that the decrees and acts of the Soviet government have been uniformly and universally denied extraterritorial effect and operation, and cannot have the effect of transferring to the Soviet government title or ownership to property not

situated within its jurisdiction. This is so whether or not there has been recognition of the government claiming title to the property. This rule has been followed and applied by this Court and the Circuit Court of Appeals for the Second Circuit in the cases of *Second Russian Ins. Co.* v. *Miller, supra,* affirming 297 Fed. 404, 409, and *Baglin* v. *Cusenier, supra,* and by the New York Court of Appeals in *Vladikavkazsky Ry. Co.* v. *New York Trust Co., supra, Frenkel* v. *L'Urbaine Ins. Co., supra,* and *James & Co.* v. *Second Russian Ins. Co., supra.*

Recognition of the Soviet government by the United States gave no retroactive validity to these confiscatory decrees in the courts of this country, and even if the Soviet government had been recognized from its beginning by our government, such recognition would have given no effect to its decrees issued thereafter. Belated recognition has no greater effect.

The rule followed by our courts and by the courts of other nations is plainly shown by the foregoing. Even the Soviet government itself recognizes that such decrees have no extraterritorial effect and has issued official declarations so stating. If the rule in this jurisdiction were not so plain, those declarations of the Russian government would be conclusive. The declarations referred to, in which the Soviet government expressly recognized the lack of extraterrtorial effect in its confiscatory decrees and expressly limited and confined their operation to the limits of Soviet territory and excluded their application to assets outside of Russia, are printed in the record on appeal to this Court in the suit of the *United States of America* v. *The President and Directors of the Manhattan Company,* &c., No. 196, decided in the District Court and Circuit Court of Appeals simultaneously with the instant

suit and to be argued in this court with the appeal in the case at bar. We refer to circular of the People's Commissariat for Foreign Affairs, No. 42, dated April 12, 1922, and the circular of the Commissariat for Justice, No. 194, dated September 26, 1923, which are printed at pages 41-42 of the record on appeal in the suit against The Bank of Manhattan Trust Company.

C. The acceptance by the petitioner of the alleged assignment is neither conclusive nor determinative of the question of public policy.

It has been urged by the petitioner that, regardless of universal opinion and regardless of what our courts may say, the public policy involved here is determined by the sovereign, and that the acceptance of the alleged assignment by the sovereign has conclusively determined that our public policy is not violated by giving effect to the confiscatory decrees over private property in the United States. The latter contention is unquestionably contrary to the Fifth Amendment to the Constitution of the United States. While the executive may determine the political policy of our government, it is our Constitution, legislation and decisions of our courts which determine our public policy. The complainant's contention is unquestionably without foundation and contrary to the principles and policy of our government.

Geofry v. *Riggs*, 133 U. S. 258, 267;
License Tax Cases, 5 Wall. 462;
United States v. *Trans-Missouri Freight Association*, 166 U. S. 299;
St. Louis Min. Co. v. *Montana Min. Co.*, 171 U. S. 650;

Hartford Fire Insurance Co. v. *Chicago, Milwaukee & St. Paul R. R. Co.*, 70 Fed. Rep. 201;
Logan & Bryan v. *Postal Telegraph Co.*, 157 Fed. Rep. 570.

In *Hartford Fire Insurance Co.* v. *Chicago, Milwaukee & St. Paul R. R. Co., supra,* the court said:

> "The public policy of a state or nation must be determined by its constitution, laws, and judicial decisions, not by the varying opinions of laymen, lawyers, or judges as to the demands of the interests of the public." Citing *Vidal* v. *Philadelphia,* 43 U. S. (2 How.) 127; *United States* v. *Trans-Missouri Freight Association,* 58 Fed. 58; *Swann* v. *Swann,* 21 Fed. Rep. 299.

Our courts have always held that where international agreements or undertakings affect the rights of private parties, our courts have the authority to act in construing and interpreting the agreements.

Foster and Elam v. *Neilson,* 2 Pet. 253;
Russian Reinsurance Co. v. *Stoddard,* 240 N. Y. 149;
United States v. *Arredondo,* 6 Pet. 691;
United States v. *Rauscher,* 119 U. S. 417;
Head Money Cases, 112 U. S. 580.

The United States Government, by the very institution of this suit, has submitted itself to the jurisdiction of the court, and thereby seeks an interpretation of the assignment and the terms thereof. Whether it may claim this fund depends in part upon such interpretation.

In *Ritter* v. *United States,* 28 Fed. (2d) 265, Circuit Court of Appeals (Third Circuit), the court said:

> "When a sovereign becomes an actor in a court of justice, *its rights must be determined upon those fixed principles of justice which govern between man and man in like situations.*" Citing *Walker* v. *United States,* 139 Fed. 409; *Cooke* v. *United States,* 91 U. S. 389; *United States* v. *Flint,* 25 Fed. Cases 1107 (No. 15121).

In *Strother* v. *Lucas,* 12 Pet. 410, 438, the court said:

> "No construction of a treaty, which would impair that security to private property, which the laws and usages of nationals would without express stipulation have conferred, would seem to be admissible further than its positive words require."

The District Court's ruling on said point was as follows:[6]

> "The suggestion of the Government that the Litvinov assignment is not open to judicial construction requires little comment, for clearly where private rights are concerned, the mere assertion of the Government that suit should be commenced does not preclude the courts from determining as a judicial matter the true meaning of the instrument involved."

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[6] Record, *Bank of N. Y. & Trust Co.* (83).

POINT II

The assignment did not cover this fund. No title to this property has been assigned to and accepted by the petitioner.

The District Court properly ruled that no assignment or transfer of the fund was ever made to the United States by the Soviet government (R. *Bank of New York and Trust Co.* 82). The Circuit Court of Appeals assumed for the purpose of argument, but did not decide that the assignment was sufficient to transfer whatever right to an accounting the assignor had (R. *Bank of New York and Trust Co.* 91).

It is a cardinal principle of contract law that an assignee can only obtain by assignment that which the assignor had. The Soviet government having no valid title by reason of the decrees of confiscation which our courts will enforce, its assignee, the petitioner, obtained no greater rights. The alleged assignment contained in the diplomatic letters (R. 57-61) is therefore inoperative (*United States* v. *Buford, supra*).

Moreover, an examination of the assignment and the language used therein makes it evident that it was never the intent to assign the funds or property in suit here. The assignment states that:

> "The Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the

Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Russian Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment" (R. 27).

The Soviet government also agreed (R. 27-28) not to make any claim with respect to:

(a) "judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits or obligations of any Government of Russia or nationals thereof."

The claims referred to in that letter are clearly intended to mean claims which *preceding Russian governments* might have had because of their transactions in this country, and such claims were particularly referred to as

"due from American nationals, including corporations, companies, partnerships or associations and also the claim against the United States Russian Volunteer Fleet, now in litigation in the United States Court of Claims." By its very terms, this purported assignment did not attempt to assign private property situated here, unless it was due from an American national to the Soviet government's predecessor. The funds in suit are not and never were due from an American national to any government of Russia.

Again, the Soviet government, in the same instrument, agreed, preparatory to final settlement of the claims and counterclaims between the United States and the Soviet government, that it would not make "any claim with respect to judgments rendered or that may be rendered by American courts in so far as they relate to property or rights or interests therein, in which the Soviet government or its nationals may have had or may claim to have an interest; or acts done or settlements made by or with the United States or public officials in the United States or its nationals relating to property, credits or obligations of any government of Russia or nationals thereof."

In the suit at bar, we have the defendant, a public official of the State of New York, who is administering the fund pursuant to orders and judgments of the New York courts (R. 32-50) and the laws of that state. Thus, the very terms of Mr. Litvinoff's letter disclaim interference with the fund and the situation here, assuming, but not conceding, the fund or situation might have been affected by omission of the exception.

At no time has any Russian government asserted or attempted to assert claim to the funds in question here. It has never been contended until now that any such funds

were due or found to be due to any government of Russia, or to the Soviet government as successor to any former Russian government. There are, therefore, no such amounts which Mr. Litvinoff's letter purports to "release and assign to the government of the United States." The President's reply to Mr. Litvinoff's letter did not go beyond an acknowledgment and repetition of the letter and assignment, so that by its very terms the entire correspondence negatives any intent to convey any right in the funds involved here. The Soviet government had no rights and asserted no rights in the funds which it could convey, since they were private funds, were never within the jurisdiction of the Soviet government, and were at no time the property of that government or any prior government of Russia.

The type of claim intended to be assigned was clearly a claim such as the one involved in State of *Russia* v. *National City Bank* (21 Fed. [2d] 396), where a *former government* of Russia had on deposit certain funds with the National City Bank, an American national. It is such funds which the government might claim under the assignment, and it is to such funds that the Soviet government, as the successor to prior governments of Russia, might have acquired title.

It cannot be assumed, and in any event not without a clear and explicit expression to such effect, that this general assignment of governmental claims carries with it the private claims of nationals, nor will our courts assume that the United States accepted a governmental assignment of any private claims of nationals in the absence of the right of such government to so assign. The funds here are in possession of the Superintendent of Insurance of the State of New York, who is bound to

distribute such funds to the persons to whom they have been awarded by decisions of our courts. They are private persons whose rights in the funds are predicated upon private transactions to which the Russian government was not a party. Therefore, the Litvinoff assignment does not and cannot transfer any title or interest in the funds in question here.

In view of the fact that the assignment is so clear as to its intent and purpose, the petitioner, seeking to circumvent its obvious inapplicability here, argues that by the institution of the present suit the interpretation given by it is conclusive, and that the interpretation by the assignor is the same. Nowhere in the record is there the slightest indication of the Soviet government having acquiesced in the institution of this suit. Even if it did, it would not make the slightest difference. On the other hand, if the petitioner should be successful in this suit, it would have to account to the Soviet government for any amount collected (R. 58). It is indeed difficult to suppose that the Soviet government in such a situation would refuse to accept the benefit of funds which it never owned and which were never due it or its predecessor government.

The argument in effect is the same as that propounded by the petitioner on the question of public policy where it is asserted that the public policy in this case is governed by the executive. We have shown that the argument is untenable and without foundation (pp. 23-25).

The petitioner in this suit, asserting its rights as an assignee of the Soviet government, is an ordinary party litigant divested of sovereignty, and, in asserting its rights to this property, comes into court as does any other suitor (*Kandle* v. *U. S.*, 4 Fed. [2d] 183; *U. S.* v. *Shelby Iron Co.*, 4 Fed. [2d] 829, 833).

In *O'Brien* v. *U. S.*, 51 Fed. (2d) 674, the court said, at page 677:

> "Although it be sovereign it should not be permitted to adopt means which are condemned by the courts when practiced by its citizens. It may not be sued save with its consent, it is true, but if it comes into court, it is as a litigant."

In any event, our courts will not recognize the transfer or assignment by a foreign government of any property other than that which belongs to it and will not uphold an assignment by a government of private property to which the government did not have title (*U. S.* v. *Percheman*, 7 Pet. 51, 86-87, by MARSHALL, *C.J.*; *Strother* v. *Lucas*, 12 Pet. 410, 438; *Coffee* v. *Grooves*, 123 U. S. 1, 9; *Kincaid* v. *U. S.*, 150 U. S. 483).

POINT III

The federal court is without power to interfere with the administration of the funds in suit here because such administration is being conducted in duly authorized proceedings pending in the Supreme Court of the State of New York. The latter court having acquired prior jurisdiction and possession of the *res*, will not be disturbed by the federal courts.

The court below affirmed the order of the District Court dismissing the bill of complaint on the ground that the District Court did not have jurisdiction, the state

court having first acquired jurisdiction in *rem*. This point, we submit, was correctly decided.

The proceedings in the Supreme Court of the State of New York with regard to the funds and assets involved in this suit were pending since 1925, long prior to the institution of the present suit and the dates of the alleged assignments[7] pressed by the complainant herein. The state court is in possession of the assets, and, having acquired jurisdiction, its possession cannot be disturbed by process out of another court:

> *United States Judicial Code*, Title 28, Section 379;
> *Byers against McAuley*, 149 U. S. 608, at 614;
> *Ellis against Davis*, 109 U. S. 485;
> *Krippendorf against Hyde*, 110 U. S. 276;
> *Covell against Heyman*, 111 U. S. 176;
> *Borer against Chapman*, 119 U. S. 587;
> *Freeman against Howe*, 65 U. S. 450;
> *Merryweather against U. S.*, 12 Fed. (2d) 407.

The possession of this fund by the state court up to the present time has been continuous and actual since 1925, long before any steps whatever were taken in the federal court and for more than eight years prior to recognition of the Soviet government. The jurisdiction of the state court over the subject-matter of this suit since 1925, having been and now being in the state court, it has been withdrawn from the jurisdiction of all other courts (*Lion Bonding & Surety Company* v. *Karatz*, 262 U. S. 77).

The New York Court of Appeals in the *Matter of People* v. *First Russian Insurance Company*, 255 N. Y.

[7] The assignment is dated November 16, 1933. The instant suit was begun November 14, 1934.

415, directed that, after payment of policyholders and creditors of the United States Branch of the First Russian Insurance Company, the surplus funds then remaining should be applied by the liquidator to the liquidation of all valid foreign claims against the First Russian Insurance Company arising from business transacted by said company outside of the United States. The administration of the fund pursuant to that de ion of the Court of Appeals in 1931 has been and is being carried on by the liquidator in the proceeding in the state court. It cannot be denied that the state court has had jurisdiction over this fund since 1925.

In this connection, the opinion of Mr. Justice BREWER, in the case of *Byers* v. *McAuley*, 149 U. S. 608, shows the principle followed by the federal courts. Mr. Justice BREWER said, at page 641:

> "First, it is a rule of general application, that where property is in the actual possession of one court of competent jurisdiction, such possession cannot be disturbed by process out of another court. The doctrine has been affirmed again and again by this court. *Hagan* v. *Lucas*, 35 U. S. 10 Pet. 400 (9: 470); *Taylor* v. *Carryl*, 61 U. S. 20 How. 583 (15: 1028); *Peck* v. *Jenness*, 48 U. S. 7 How. 612, 625 (12: 841, 846); *Freeman* v. *Howe*, 65 U. S. 24 How. 450 (16: 749); *Ellis* v. *Davis*, 109 U. S. 485-498 (27: 1006-1010); *Krippendorf* v. *Hyde*, 110 U. S. 276 (28: 145); *Covell* v. *Heyman*, 111 U. S. 176 (38: 390); *Borer* v. *Chapman*, 119 U. S. 587, 600 (30: 532, 537). • • • and, vice versa, the same principle protects the possession of the property while thus held, by process issuing from state courts, against any disturbance under process of the courts of the United States, excepting, of course, those

> cases wherein the latter exercise jurisdiction for the purpose of enforcing the supremacy of the Constitution and laws of the United States * * *."

This principle has been reiterated in *Lion Bonding & Surety Company* v. *Karatz*, 262 U. S. 77, in which Mr. Justice BRANDEIS said:

> "Where a court of competent jurisdiction has, by appropriate proceedings, taken property into its possession through its officers, the property is thereby withdrawn from the jurisdiction of all other courts, *Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38, 54. Compare *Oklahoma* v. *Texas*, 258 U. S. 574, 581. Possession of the *res* disables other courts of coordinate jurisdiction from exercising any power over it. *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51, 61. *The court which first acquired jurisdiction through possession of the property is vested, while it holds possession, with the power to hear and determine all controversies relating thereto.* It has the right, while continuing to exercise its prior jurisdiction, to determine for itself how far it will permit any other court to interfere with such possession and jurisdiction. *Palmer* v. *Texas*, 212 U. S. 118, 126, 129."

It is respectfully submitted that this suit cannot be maintained, in view of the principles and rules repeatedly laid down by this Court, that where a state court and a federal court have jurisdiction of a matter, the court which first acquired jurisdiction retains it until its jurisdiction has been exhausted and its duties discharged in full. As was stated in *Peck* v. *Jenness*, 7 How. 624:

> "It is a doctrine of law too long established to require citation of authorities, that, *where a court has jurisdiction, it has a right to decide every ques-*

> *tion which occurs in the cause,* and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other court; and that, where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court. * * * Neither can one take the property from the custody of the other by replevin, or any other process, for this would produce a conflict extremely embarrassing to the administration of justice."

To the same effect, see also:

> *Freeman* v. *Howe,* 24 How. 450;
> *Buck* v. *Colbath,* 3 Wall. 334;
> *Harkrader* v. *Wadley,* 172 U. S. 148;
> *Prout* v. *Starr,* 188 U. S. 537.

The court below, in deciding the question of jurisdiction, said:

> "* * * Rather extensive liquidation proceedings have been conducted in the New York Courts which it will now serve no good purpose to relate in detail. *The important matter is that before this action was commenced the fund in controversy had been taken into the custody of the New York Court and has ever since remained in its custody. The sole purpose of the proceeding in the New York Court was to liquidate the fund and distribute it according to its laws. To that end, the state suit was in rem."*

It must be remembered that, unlike the *Bank of Manhattan* and *Bank of New York* cases, the liquidator here, pursuant to the authority vested in him by the New York courts, is still in possession of the *res,* has never relin-

quished it, and is today administering the fund in accordance with the laws of New York State, in a strictly *rem* proceeding. The state court, therefore, cannot be deprived of its jurisdiction over the *res* (*Covell* v. *Heyman*, 111 U. S. 176; *Harkin* v. *Brundage*, 276 U. S. 36; *Lion Bonding & Surety Co.* v. *Karatz, supra; Wabash R. R. Co.* v. *Adelbert College*, 208 U. S. 38; *Farmers' Loan & Trust Co.* v. *Lake Street Elevated R. R. Co.*, 177 U. S. 51).

It is claimed, however, that though the state court acquired custody and control of the property by virtue of the liquidation proceedings, that the court's authority ended when domestic creditors were paid (p. 78). The Superintendent of Insurance, as liquidator, however, in taking over the company pursuant to Section 63 of the Insurance Law, did so not only for the benefit of local creditors, but for the benefit of policyholders, creditors and stockholders wherever they may be. In *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, the Court of Appeals of the State of New York interpreted and construed Section 63 of the Insurance Law. The court said, at pages 155, 156, 157:

> "If so an inspection of section 63 of the Insurance Law under which the proceeding was taken indicates the intent of the Legislature. That section provides that in certain cases the Superintendent may apply to the Supreme Court for an order directing the corporation to show cause why he should not take possession of its property and conserve its assets for the benefit of its creditors and for such other relief as the nature of the case and the interests of its policyholders, *creditors, stockholders or the public may require. The Superintendent is not, therefore, to take possession of the property solely for the benefit of creditors or policyholders*

in this state or in the United States but for the interest of all its policyholders, creditors and stockholders wherever they may be. He is to liquidate the business here for that purpose. The section proceeds that if the court directs the Superintendent to take possession of the property and conserve the assets of the corporation his rights and duties with reference to the corporation and its assets shall be those heretofore exercised by and imposed upon ancillary receivers of foreign corporations in this State."

"* * * Not content with this statement, however, the Legislature gives a further indication of its purpose. Primarily the Superintendent takes possession of the assets for a specific object. But secondarily in the interest of the general policyholders, creditors and stockholders." * * *

"* * * *We have the right to assume that the English courts will act equitably.* If local creditors or policyholders in whose interest the Superintendent acts had not been paid in full; *if there was danger that in a foreign jurisdiction they would not receive fair treatment as to any balance that might be due them, we might transmit any funds not applicable to the preferential payment of their claims, under conditions designed to protect their interests or make such other disposition of them as we thought wise.* * * *"

The Court of Appeals, in the liquidation proceeding in this case, after domestic creditors had been paid, declared that the liquidator continue in possession in order that foreign claims might be paid by him (*Matter of People, First Russian, supra*). In view of that pronouncement by the Court of Appeals, made in 1931, there can be no question but that the State of New York and the liquidator since 1925 to date have obtained and kept continuous jurisdiction and possession of the *res.*

POINT IV

Refutation of Petitioner's Argument

It is intended, under this Point, not only to categorically answer and refute petitioner's argument, but at the same time to supplement and amplify respondent's argument with regard to the same points.

I

(a) It is argued that the funds herein involved, having belonged to a Russian corporation, the sovereign had the power to destroy said corporation and appropriate and confiscate its assets. It is quite true that a government enjoys control over corporations created by it, and that its power includes the right to dissolve any such corporation and to appoint a liquidator vested with title to the corporate property, but, in every instance where extra-territorial effect has been given to such legislation, it has concerned transfers pursuant to statutes enacted for the purpose of expediting the proper and equitable distribution of assets of the dissolved corporation to policyholders, creditors or any other interested parties.

Relfe v. *Rundle,* 103 U. S. 222;
Clark v. *Williard,* 292 U. S. 112;
Martyne v. *American Fire Union Ins. Co.,* 216 N. Y. 183;
Cogliano v. *Ferguson,* 245 Mass. 264;
Bockover v. *Life Assn. of America,* 77 Va. 85.

Such rules have no application where the transfer at the domicile is by confiscation or any other method in vio-

lation of our public policy. Obviously, the confiscatory decrees of the Soviet government involved herein provide a clear distinction from the cases cited in appellant's brief, particularly *Canada Southern Railway Co.* v. *Gebhard*, 109 U. S. 527. We have demonstrated under Point I of this brief that under well-defined and recognized principles of international law, extraterritorial effect will be denied confiscatory decrees, and it is submitted that this Court should follow that rule and deny the effect of the confiscatory decrees sought to be given here, which is so repugnant and shocking to the public policy of this country.

Under the same Point, it is further argued by the petitioner that the Soviet decree of confiscation provided for a liquidating commission and that the latter took title to the assets in this country. Further, that the funds in suit were deposited solely for the benefit and security of domestic policyholders and creditors and that upon completion of payment to them the funds should have been turned over to the so-called liquidating commission.

If the Russian government was the statutory successor or liquidator (which it was not), even then it would have to submit to the laws of the place where the property is located, and those laws are to the effect that the decrees of the Soviet government, confiscatory as they admittedly are, will not be given such effect as to destroy property rights to the fund actually in the possession of the State of New York. What is more, the New York State Court of Appeals, after domestic creditors were fully paid, expressly declared that foreign claimants should be paid in this proceeding (*Matter of People* [*First Russian Ins. Co.*], 255 N. Y. 415). The court there said, page 423:

"* * * The creditors so proving were acting in response to a published invitation, published in accordance with the order of liquidation, to submit claims of every kind without reference to the place of origin, and were stayed in the meantime from a remedy in the courts. *There would be manifest inequity if at this late day an ancillary receiver were to remit them to their legal remedies and thus compel them to prove anew* (cf. *Sands* v. *Greely & Co.*, 88 Fed. Rep. 130, 133; *Culver Lumber & Mfg. Co.* v. *Culver*, 81 Ark. 102; and see 44 Harvard Law Review, pp. 437-442, collating the decisions). *A court of equity, when once it has assumed control over a fund, may grant relief that 'would otherwise be beyond the scope of its authority'* (*McGean* v. *Metropolitan Elevated Ry. Co.*, 133 N. Y. 9, 17), *if justice so requires.*"

Where it is apparent that the foreign liquidator or statutory successor would not preserve the rights of creditors, the courts of the United States may properly refuse to turn over such funds and may resort to the fundamental doctrine that American law determines title to assets situated here. In *Clark* v. *Williard, supra,* Justice CARDOZO, in speaking of the rights of the statutory successor of an Iowa corporation in respect of corporate assets located in Montana, said:

"In respect of his subjection to the power of the local law, his position is no better than that of the dissolved corporation to whose title he has succeeded or of its voluntary assignee upon a trust for all the creditors. *He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession.*"

In *Matter of People* (*First Russian Ins. Co.*), *supra*, which involved the funds in suit here, the court said, at page 424:

> "• • • Distribution must then be made in submission to the principle that equality is equity (*Matter of People* [*City Equitable Fire Ins. Co.*], *supra*). Conditions are different in the case before us. *There is no receiver at the domicile*, and the corporations are still solvent, willing, as well as able, to pay their creditors in full."

In other words, the highest court of the State of New York has held that the Superintendent of Insurance should not remit funds to a "foreign liquidator," either where it appears that there is no foreign liquidator, as in this case, or where it is obvious that the foreign liquidator will not deal justly with such funds.

In deciding this point in the District Court, the court said:

> "It is insisted on behalf of the United States that the Soviet Government became the 'liquidator' of the assets of the two dissolved Russian Insurance companies, and that a liquidator's title will be accorded recognition in our courts. The difficulty with this contention is that the complaints allege specifically that the properties of the two companies were 'confiscated and appropriated' by the Soviet Government. However, it is perfectly clear that the liquidation of a corporation implies winding up and distributon of the assets among the creditors and stockholders; *Lafayette Trust Co.* v. *Boggs*, 213 N. Y. 260, 263; *Matter of Silkman*, 121 A. D. 202; • • •"

It has always been the policy of the State of New York to protect the interests of creditors and shareholders even

as against a domiciliary liquidator. In *Martyne* v. *American Union Fire Ins. Co., supra,* the title of the statutory liquidator of a dissolved Pennsylvania Insurance Company was recognized as to New York assets because it was a title in trust for creditors and was in harmony with the New York law. The Court expressly stated that the title of foreign statutory assignees is recognized and enforced only "where it can be without injustice." Likewise, in *Matter of People* (*City Equitable Fire Insurance Company*), 238 N. Y. 147, 157, and *Matter of People* (*Norske Lloyd Insurance Company*), 242 N. Y. 148, 165, *et seq.*, the New York Court of Appeals pointed out that under the provisions of the Insurance Law of the state, funds of a foreign insurance company deposited with the Superintendent of Insurance are held not only for the primary benefit of local creditors, but secondarily for the benefit of all the creditors and stockholders of the company wherever they may be and that surplus funds will be turned over to a foreign liquidator only where it appears that such foreign liquidator will deal justly and fairly with such surplus funds.

It is clear then that not only is it well settled that the Soviet government could acquire no title to New York assets by the decrees relied on by petitioner, and that such decrees are contrary to the public policies of the state and the nation, but that the disposition of the New York assets must be in accordance with the law of the State of New York, and that, under the circumstances, New York having possession of the property, could do with it what it pleased, to the end that justice and equity might prevail (*Clark* v. *Williard, supra; Matter of People* (*First Russian*), *supra; Sands* v. *E. S. Greeley & Co.*, 88 Fed. 130).

(b) It is a misstatement of the law to state without qualification that recognition validates all decrees of the country recognized, from the commencement of its existence, and that it therefore follows that such decrees must be given effect in our courts. We have already shown under Point I, pages 10-16, that recognition retroactively validates only the effect of those decrees *in* Russia, and, secondly, that recognition in and of itself does not operate so as to automatically require our courts to give effect to such decrees. If they contravene our established public policy, or if they are contrary to any of our fundamental rules of justice and equity, our courts will not permit that they be given effect here.

The case of *Lazard Bros. & Co.* v. *Midland Bank, Ltd.* (1933 App. Cases, 289), relied upon by the petitioner, merely held that the *Banque Industrielle de Moscou,* a Russian bank, was not in existence in October, 1930. The Court did not construe Soviet decrees of confiscation or adjudicate the effect of such decrees upon property in England, but, in a later case it was held that notwithstanding the Soviet decrees of dissolution of Russian banks, the English branch of a Russian bank could be wound up under the provisions of the English Companies' Act, equivalent to our liquidation law. *In re Russian Bank for Foreign Trade* (133 Chancery Division 745), the Court said:

> "the decrees, as is admitted by both experts, were of a confiscatory character (p. 763) * * *. If the debt was primarily recoverable in London, I am of opinion that it was not affected by the Soviet legislation, even though it was due to a person who was a Russian subject at the date of the nationalization decrees. Its locality must be taken to be the place where the debt was in the ordinary course

recoverable (citing authorities). The decrees in question could not according to our laws have the effect of extinguishing the debt if locally situate here, or of transferring it to the Soviet Republic; (p. 767) * * *. Effective as such legislation may be within the limits of Russian territory, it cannot determine the ownership of property locally situate in this country, such as debts owing from debtors here (p. 768); * * * Of course if I am right in thinking that the nationalization decrees have no extra-territorial operation, the R. S. F. S. R. have no claim to any of the property which is involved, and as I have pointed out this seems to be their own view" (p. 770).

(c) It is asserted by the petitioner that the Russian decrees of confiscation are not opposed to the public policy of the United States because the law to be invoked is the law of Russia and because local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign sovereign.

1. The petitioner disclaims any attempt to give extra-territorial effect to the Soviet decrees on the theory that the title to these funds depends upon the law of Russia. It is admitted by the petitoner that under the rule in conflict of laws no state can make a law which by its own force is operative in another state, but it is claimed that the rights and interests in this state depend upon the law of Russia because it is said the petitioner has acquired its title by virtue of Soviet decrees.

It is true that in Russia, Russian property or property rights can be dealt with as the sovereign sees fit, by confiscation or otherwise, and we have never disputed this rule, but to go further and say without qualification that

the rule applies to property outside of the domain of the sovereign is challenged by us. The petitioner has no authority for such contention. *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, and *Ricaud* v. *American Metal Co.*, 246 U. S. 304, hold no more than that the acts of foreign sovereigns upon property or rights in their own territories will not be disturbed by our courts.

Moreover, as we have already shown, this Court, as well as others, has held that a state court has full dominion over a fund such as this and that title to the property or fund depends upon where it is located. The property in suit has always been in the State of New York and the State of New York has ruled that the fund must be distributed to those having valid claims against it (*Matter of People* [*First Russian*], *supra*). The title to particular assets is determined by the law of the situs, and New York law applies in determining the procedure and control of the distribution of New York assets among creditors.

2. It is stated by the petitioner that local public policy may not be invoked to subject to the jurisdiction of a local court the property of a foreign sovereign. The statement itself is founded on a false premise because it assumes in the first instance that under our laws the property in suit belongs to the foreign sovereign, Soviet Russia. We have shown that this property never belonged to that sovereign and that title to it never passed to the petitioner. But, it is said that a defense given by the law of a foreign jurisdiction may not be thwarted because of the public policy of the forum (citing *Bradford Elec. Co.* v. *Clapper*, 286 U. S. 145). The argument is unsound, particularly as applied here. There is a distinction to be made betwen the use of Soviet decres as the basis for

maintaining an action and their use as defenses to an action. Public policy may deny to a plaintiff a right to enforce a cause of action based on such decrees, but, indeed, this is a far cry from asserting the decrees as a defense.

This distinction was pointed out in *Luther* v. *Sager* [1921] 3 K. B. 532, where the Court said, at page 549:

> "Some reliance was placed by the respondents upon the principle enunciated in such cases as *Kaufman* v. *Gerson* ([1904], 1 K. B. 591), that the Courts of this country will not enforce a contract invalid by our law as being in contravention of some essential principle of justice or morality, notwithstanding that by the law of the country where it was made no objection could be raised to it. In my opinion this principle has no application. The appellants are not seeking to enforce such a contract. They are resisting an endeavor on the part of the respondents to induce the Court to ignore and override legislative and executive acts of the Government of Russia and its agents effecting the title to property in that country; it is that which, in my opinion, we are not at liberty to do."

Public policy will refuse to permit the petitioner to use the confiscatory Soviet decrees as a sword.

It is further argued by petitioner under this Point that the executive branch of this government determines and has determined the public policy of the United States in this case. It is submitted that such contention is untenable (*ante*, pp. 23-25). The Executive may determine the political policy of the nation, but he cannot determine its public policy, particularly in a juridical sense, where the issue is the determination of private property and rights (*Hartford Fire Ins. Co.* v. *Chicago, Milwaukee & St. Paul R. R. Co., supra*).

The Executive cannot confiscate private property. The delegation of power to the Executive upon subjects and matters of foreign relations such as neutrality questions (*U. S.* v. *Palmer*, 3 Wheat. 610), boundary questions (*Foster* v. *Neilson*, 2 Pet. 253, 307-309), and sovereignty over a particular territory (*Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420), does not include the power or authority to determine the public policy to be given effect by our courts in a purely juridical matter concerning the effect of foreign legislation upon property in this country.

(d) It is argued by the petitioner that the property here involved, which has always been in this country, was legally situated in Russia and that the Soviet government thereby acquired such a title to it as will be recognized by our courts. The argument states, in effect, that the fund here, consisting of cash and securities, is an intangible, and under the doctrine of *mobilia sequuntur personam* had its situs in Russia, the domicile of the Russian corporation. The suggestion thus made is contrary to the decisions of this Court.

In *De Ganay* v. *Lederer*, 250 U. S. 376, this Court held that stocks, bonds, etc., may have a situs in the place where the paper is found, just like other tangible properties. The Court said in that case, at pages 381-382:

> * * * "Are they property within the United States? It is insisted that the maxim, 'Mobilia sequuntur personam,' applies in this instance, and that the situs of the property was at the domicil of the owner in France. *But this court has frequently declared that the maxim, a fiction at most, must yield to the facts and circumstances of cases which require it; and that notes, bonds, and mort-*

gages may acquire a situs at a place other than the domicil of the owner, and be there reached by the taxing authority."

It has been repeatedly held that a State has the same jurisdiction over bank deposits as it has over tangible property within its borders and this is so although the deposit is with a local branch of a foreign bank or insurance company (*Rex* v. *Lovitt* [1912], A. C. 212, 218, 219; *Richardson* v. *Richardson* [1927], 43 T. L. R. 631, 633).

In *Security Savings Bank* v. *California,* 263 U. S. 282, it was held by this Court that the State of California has full dominion over deposits in a California savings bank, even though the depositors or their heirs or legal representative may reside elsewhere.

The funds in the instant case have always had their situs in this state and are completely localized here. It is submitted that under the doctrine of the *Security Savings Bank* case, it is clear that the State of New York has dominion over the funds and has the right to determine the title to these funds just as it would have jurisdiction over the properties within its borders if they were tangibles. The cases cited by petitioner in connection with its argument that the funds have a legal situs in Russia have therefore no application.

The petitioner completely overlooks the fact that not only has the fund always been within the jurisdiction of the State of New York, but, in accordance with Section 27 of the Insurance Law, the fund when deposited here was held by the Superintendent of Insurance as trustee. Legal title to this fund, therefore, was never in any one else but the Superintendent of Insurance.

The weakness of petitioner's argument in this respect is apparent for it is stated that the property here "might" originally have had a situs here by virtue of Section 27 of the Insurance Law but that its situs was transferred in some unexplained manner to Russia when domestic claims were paid. The fallacy in this argument lies in the fact that New York never lost control or jurisdiction of this fund. Upon completion of payment of purely local creditors, the Court directed that the fund remain here for the purpose of paying all other creditors, and stated that the purpose in assuming and retaining jurisdiction and control was for the benefit of policyholders and creditors everywhere (*Matter of People, First Russian, supra*). This was in accordance with the expressed policy of the State of New York to afford protection to creditors and policyholders, even as against a domiciliary liquidator, when it was felt that justice and equity could not otherwise be done (*Matter of People, City Equitable, supra; Matter of People, Norske Llyod, supra*).

The same rule was applied by this Court in *Clark* v. *Williard, supra,* as we have already pointed out, where it was held that even a domiciliary liquidator must submit to the mandate of the sovereignty that has the physical control of the property.

(e) It is also claimed by the petitioner that the rights herein asserted on behalf of adverse claimants also had a situs in Russia and were governed by Russian law.

The argument assumes that the controversy now before the Court is between the rightful owner of property and a creditor asserting against the property, or that it is a controversy between two parties to a contract where the rights of one party depend upon the law where the contract was to be performed. No such situation is be-

fore the Court. The respondent herein, the Superintendent of Insurance, as liquidator, holds the fund for specific purposes, pursuant to orders and directions of the New York courts. In carrying out those instructions problems may arise as to contract rights of certain creditors who claim against the fund held by him, but in the instant case the United States is claiming by virtue of Soviet confiscatory decrees a paramount right of title to the fund held by the Superintendent of Insurance of the State of New York as liquidator. There is nothing herein in the nature of a contract between the petitioner and respondent which must be determined by Russian law. *Dougherty* v. *Equitable Life Assurance Society*, 266 N. Y. 71, is not to the contrary and that case has no application because the problem there before the Court was that of contract rights made in Russia, performable in Russia and as expressly provided in the contracts under consideration in that case to be governed by Russian law. The Court gave no extraterritorial effect to the confiscatory decrees.

In any event, the assertion by petitioner that Soviet decrees resulted in extinguishment of liabilities everywhere (p. 45) is not the law. In *James* v. *Second Russian Insurance Co.*, 239 N. Y. 248, the Court of Appeals said, at page 257:

> "• • • *As to the Soviet decree, we think its attempted extinguishment of liabilities is brutum fulmem, in England as well as here, and this whether the government attempting it has been recognized or not.* Russia might terminate the liability of Russian corporations in Russian courts or under Russian law. *Its fiat to that effect could not constrain the courts of other sovereignties, if*

assets of the debtor were available for seizure in the jurisdiction of the forum (*Barth* v. *Backus*, 140 N. Y. 230; *Matter of People* [*City Equitable Fire Ins. Co.*], 238 N. Y. 147, 152; cf. *Matter of Barnett's Trusts*, 1902, 1 Ch. 847)."

"* * * Neither comity nor public policy requires us to enforce a mandate of confiscation at the behest of such a government to the prejudice either of our own citizens or of those of any friendly power seeking justice in our courts."

II

Under this Point it is argued by the petitioner that the funds held by the respondent were transferred to the petitioner by the Litvinoff assignment; that the language of the assignment covered the funds; and that the interpretation adoped by the sovereign should control. We believe that we have fully answered the first portion of this argument under our Point II, pages 26-31.

In further answering the contention of the petitioner, we may say that indications point to the fact that even the Soviet government is not in accord with the United States as to the interpretation to be placed upon the assignment. The petitioner asserts that the claim of the Russian volunteer Fleet against the United States was specifically mentioned in the assignment because it was a direct claim against the United States and because the Russian Volunteer Fleet is the instrumentality of the Soviet government. If that be so, and it must be remembered that this assertion is made by the United States, the petitioner, then it seems clear that the Soviet differs with the United States as to the interpretation to be placed on the assignment, because, in a suit now pending

in the United States Court of Claims (*Russian Volunteer Fleet* v. *United States*), the plaintiff, Russian Volunteer Fleet, the so-called instrumentality of the Soviet government, disputes the effect and interpretation to be given said assignment, and is continuing its suit against the United States.

III

It is argued by the petitioner that the Court below was in error in holding that the federal court could not oust the state court of the prior jurisdiction and control of the *res* obtained by it.

(a) Section 24 (1) of the Judicial Code does not do more than confer original jurisdiction upon the District Courts to entertain suits brought by the United States. It does not give to the District Courts exclusive jurisdiction or enable that court to interfere with the prior jurisdiction of a state court having possession of and dealing with a *res*.

Section 265 of the Judicial Code provides:

> "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy."

In *Merryweather* v. *United States*, 12 Fed. (2d) 407, the Court said, at pages 409-410:

> "While the United States courts have original jurisdiction of suits at common law or in equity wherein the United States is plaintiff, such jurisdiction is not exclusive. Interpretations of the

> Constitution settled that point many years ago. In *Plaquemines Fruit Co.* v. *Henderson,* 170 U. S. 511, 18 S. Ct. 685, 42 L. Ed. 1126, it was held that the words, 'judicial power,' used in Section 1 of article 3 of the Constitution, do not withdraw from the states authority to determine by their courts all cases and controversies to which the judicial power of the United States was extended and of which jurisdiction was not given to the national courts exclusively. 'Nothing more,' said the court, 'was done by the Constitution than to extend the judicial power of the United States to specified cases and controveries, leaving to Congress to determine whether the courts to be established by it from time to time should be given exclusive cognizance of such cases or controversies or should only exercise jurisdiction concurrent with the courts of the several states.' *Robb* v. *Connolly,* 11 U. S. 624, 636, 4 S. Ct. 544, 28 L. Ed. 542; Foster's Fed. Prac. vol. 1, p. 27."

In *Penn General Casualty Co.* v. *Pennsylvania,* 294 U. S. 189, this Court, in referring to a court which had first acquired jurisdiction, said:

> "• • • Hence, it alone can rightfully assert control over the property and proceed with litigation which affects that control, *Palmer* v. *Texas,* supra, 129, 130; *Wabash R. Co.* v. *Adelbert College,* supra, 54, and it alone can determine how far it will permit any other court to interfere. *People's Bank* v. *Calhoun,* 102 U. S. 256, 262; see *Riggs* v. *Johnson Co.,* 6 Wall. 166 • • •"

(b) It is also contended by the petitioner that the rule of priority is, in any event, not applicable because the New York State court proceeding is not in *rem* and because the present suit is also not in *rem.* The former con-

tention is not strenuously urged in this suit against the liquidator because it cannot seriously be doubted that the proceeding in the state court, which was commenced in 1925, was a strictly *rem* proceeding. The possession of the property at that time by the Superintendent of Insurance, as liquidator, under the New York statute[8] was equivalent to *custodia legis*. The liquidator is an ancillary receiver of the property of a foreign corporation.[9] (*Matter of People* (*Russian Re Co.*), 255 N. Y. 415, 423, 424; *Matter of People* (*City Equitable Fire Ins. Co.*), 238 N. Y. 147, 156).

In *Jacoby* v. *Bond and Mortgage Co.*, 72 Fed. (2d), 420, and *Tolfree* v. *New York Title and Mortgage Co.*, 72 Fed. (2d) 702, the Court said in each case:

> "By virtue of the order and Article 11 of the Insurance Law the Superintendent became in effect a receiver under the supervision of the state court and the property under his control became in *custodia legis.*" (Citing cases.)
>
> "In such circumstances, under established rules of law, the federal courts should not interfere with the possession of the state court." (Citing cases.)

It is claimed, however, by the petitioner that if the state court did have jurisdiction, it was lost when local creditors were paid. But, while the Superintendent of Insurance as liquidator, by order of the court held possession and jurisdiction of the *res*, and before recognition, the New York state court ruled that such possession should be maintained and continued for the specific pur-

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[8] Former Section 63 of the Insurance Law, now Article 11 thereof.

[9] Section 63, subdivisions 4 and 5, New York Insurance Law, now Article 11, § 400-428.

pose of paying foreign claims. (*Matter of People, First Russian, supra*). That possession and jurisdiction has never been relinquished by the courts of the State of New York, and nothing, not even subsequent recognition of the Soviet government, could oust the state court of possession and jurisdiction of the property within its control. (*Sands* v. *E. S. Greeley, supra.*)

The petitioner also contends that the present suit is not in *rem* but in *personam*. That contention is also disputed. The court below held that *if* the state court proceeding were in *personam* (and it was held to the contrary), only then could another action in another jurisdiction, also in *personam*, be had. But the court held further that the present suit was not in *personam*, saying:

> "Nor is there any question here of the personal liability of the defendant apart from what may attach solely from the fact that a fund in custody of the State court to which the plaintiff makes claim has been placed in its possession under the order of the State court."[10]

The present suit brought by the petitioner, although in form one for an accounting, is in fact not such a suit for it asserts a claim to the whole fund in possession and control of the state court and does not seek personal liability against the liquidator. The case of *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33, strongly relied upon by petitioner, is not, therefore, in point, and, as the court below correctly said, "there being no such personal liability there is no room for the application of the rule expressed in *Waterman* v. *Canal-Louisiana Bank*, 215 U. S. 33."

[10] This was said in connection with the *Bank of New York* and *Bank of Manhattan Co.* cases, but it applies even more strongly to the instant case where the liquidator still holds the fund pursuant to court order.

So, also, the case of *Brown* v. *Duffin,* 13 Fed. (2d) 708, has no application here. The holding in that case was predicated on the fact that the proceeding first brought was in *personam* and therefore was no bar to a second action in the federal courts. We submit that it is plain that the liquidation proceeding, which has not been completed, is a *rem* proceeding, and the *Brown* case is not in point. Moreover, the case of *Waterman* v. *Canal-Louisiana Bank, supra,* holds that a suit for an accounting in a federal court, if brought subsequent to a suit in *rem* in the state court, irrespective of the prayer for an accounting, cannot be maintained. It is further submitted that even under the *Brown* case the federal court has no jurisdiction because the court below held in that case that if the first action had been in *rem,* as in the case at bar, then the state court would have had exclusive jurisdiction.

(c) The petitioner contends that even if the federal courts have no exclusive jurisdiction, and even if the New York state court proceeding is in *rem,* nevertheless the rule of priority is not applicable because the property was sovereign property, and because after local claims were paid jurisdiction was forever lost.

It is respectfully submitted, first, that it has been conclusively shown that the Soviet government never at any time, whether before recognition or after, could obtain title by virtue of its confiscatory decrees over the property, which has always been situated within the State of New York; and, secondly, that New York, under its inherent power to deal with the fund under its jurisdiction and control, never lost jurisdiction after payment of local creditors, but, on the contrary, retained such jurisdiction for the express purpose of paying foreign claims, and that said proceeding for the purposes indicated, is

today still being maintained by the liquidator in the New York courts. The statement that the nationalized corporation could not institute a proceeding sufficient to give the court any jurisdiction, in *rem* or otherwise, is untenable because prior to recognition the New York courts recognized the right of such corporation to sue in its courts, but principally because the proceeding in the state court in this case, which was instituted in 1925, was not begun by the Russian corporation but was brought by the Attorney General of the State of New York on behalf of the Insurance Department and the People, for the protection of creditors, policyholders and the public everywhere.

CONCLUSION

The District Court properly held that the fund in suit was in no way affected by the Soviet decrees of confiscation and that the petitioner did not acquire title by assignment from the Soviet government.

The Circuit Court properly held that the federal court had no jurisdiction of this cause, the state court having obtained prior jurisdiction of the *res*.

It is respectfully submitted that the decision of the court below is correct and the decree dismissing the bill of complaint should be affirmed.

Respectfully submitted,

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December, 1935.

[APPENDIX FOLLOWS]

APPENDIX

Section 27, New York Insurance Law:

"Funds and capital within the United States of corporations organized outside of the United States, transacting in this state the business of fire or marine insurance.

"1. No insurance corporation organized and existing under the government or laws of any state or country outside of the United States, hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state, shall transact such business therein unless it shall have securities or other property within the United States, deposited with insurance departments or state officers and held in trust by a trustee or trustees, as hereinafter provided, for the protection of all its policyholders and creditors within the United States, as follows: (a) If authorized to transact the business of fire insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and three hundred thousand dollars deposited with insurance departments or state officers or so held in trust; (b) if authorized to transact the business of marine insurance only, two hundred thousand dollars deposited with the superintendent of insurance of this state and one hundred thousand dollars deposited with insurance departments or state officers or so held in trust; or (c) if authorized to transact the business of both fire and marine insurance, four hundred thousand dollars deposited with the superintendent of insurance of this state and four hundred thousand dollars deposited with insurance departments or state officers or so held in trust.

"2. For all purposes specified in this chapter, the capital of such a foreign insurance corporation now or hereafter authorized to transact the business of fire or marine or fire and marine insurance in this state shall be the aggregate value of all securities and other property within the United States deposited with insurance departments or state officers and held in trust by a trustee or trustees for the protection of all its policyholders within the United States, or all its policyholders and creditors within the United States, after taking from such aggregate value the same deductions for losses, debts, and liabilities in the United States and for unearned premiums on risks therein not yet expired as are authorized or required by the laws of this state or the regulations of the superintendent of insurance with respect to domestic insurance corporations transacting the same kind or kinds of business. * * *"

Section 63, New York Insurance Law:

"*Proceedings against and liquidation of delinquent insurance corporations.* This section shall apply to all corporations, associations, societies and orders to which any article of this chapter is applicable, and to all corporations, associations, societies and orders which are subject to examination under any section of this chapter, or which are doing or attempting to do or representing that they are doing the business of insurance in this state, or which are in process of organization intending to do such business therein, anything as to any such corporations, associations, societies or orders provided in this article to the contrary notwithstanding; and the words 'corporation' or 'corporations' herein shall also include all such associations, societies and orders as well as all voluntary or unincorporated associations.

"1. Whenever any domestic corporation (a) is insolvent; or (b) has refused to submit its books, papers, accounts or affairs to the reasonable inspection of the superintendent, or his deputy or examiner; or (c) has neglected or refused to observe an order of the superintendent to make good within the time prescribed by law any deficiency, whenever its capital, if it be a stock corporation, or its reserve, if it be a mutual corporation, shall have become impaired, or (d) has, by contract of reinsurance or otherwise, transferred or attempted to transfer substantially its entire property or business, or entered into any transaction the effect of which is to merge substantially its entire property or business in the property or business of any other corporation, association, society or order, without having first obtained the written approval of the superintendent; or (e) is found, after an examination, to be in such condition that its further transaction of business will be hazardous to its policyholders, or to its creditors, or to the public; or (f) has wilfully violated its charter or any law of the state; or (g) whenever any officer thereof has refused to be examined under oath touching its affairs; or (h) if such corporation be organized under article six, seven or eight of this chapter, its condition is found, after examination, to be such that it could not meet the requirements for incorporation and authorization specified in such articles, respectively, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which the principal office of such corporation is located for an order directing such corporation to show cause why the superintendent should not take possession of its property and conduct its business, and for such other relief as

the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require."

* * * * * *

"4. Whenever any of the grounds of jurisdiction over domestic corporations specified in subdivisions (a), (b), (c), (d), (e), (f) and (g) of subsection one of this section exist or arise with reference to any corporation incorporated by or existing under the government or laws of any country outside of the United States and authorized to transact the business of insurance and having assets in this state; or whenever any foreign corporation so authorized and having assets in this state has been placed in the hands of a receiver *or had its property sequestrated in its domiciliary state or country* or in any other state or country, the superintendent may, the attorney general representing him, apply to the supreme court or any justice thereof in the judicial district in which such corporation has its principal office for the transaction of business in this state, for an order directing such corporation to show cause why the superintendent should not take possession of its property and conserve its assets for the benefit of its creditors, and for such other relief as the nature of the case and the interests of its policyholders, creditors, stockholders, or the public may require.

"5. On such application, or at any time thereafter, such court may, in its discretion, issue an injunction restraining such corporation and its officers, agents and employees from the transaction of its business or disposition of its property until the further order of the court. On the return of such order to show cause, and after a full hearing, the

court shall either deny the application or direct the superintendent forthwith to take possession of the property and conserve the assets of such corporation, and retain such possession until, on the application either of the superintendent, the attorney general representing him, or of such corporation, its shall, after a like hearing, appear to the court that the ground for such order directing the superintendent to take possession has been removed and that the corporation can properly resume possession of its property and conduct its business. If, on such application, the court shall direct the superintendent to take possession of the property and conserve the assets of such corporation, the rights and duties of the said superintendent with reference to such corporation and its said assets shall be those heretofore exercised by and imposed upon anciliary[1] receivers of foreign corporations in this state."

[1] So in original.